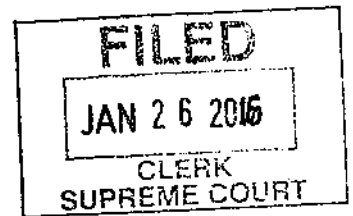


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2015-SC-000371-TG



KENTUCKY RESTAURANT ASSOCIATION, et al

APPELLANTS

vs.

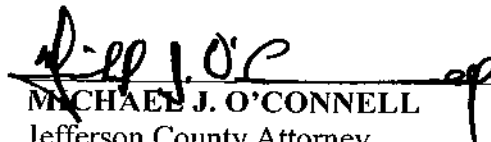
ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
NO. 15-CI-000754

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT

APPELLEES

BRIEF FOR THE APPELLEES

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief for the Appellees* was mailed by U.S. First Class mail, postage prepaid to: Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Honorable Judith McDonald-Burkman, Judicial Center, 700 W. Jefferson St., 8th Floor, Louisville, Kentucky 40202; Brent R. Baughman, Aleksandr "Sasha" Litvinow, Bingham, Greenebaum, Doll LLP, 3500 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40202, on this the twenty-fifth (25th) day of January, 2016.


MICHAEL J. O'CONNELL

STATEMENT CONCERNING ORAL ARGUMENT

Appellees request oral arguments in this case to fully discuss the legal issues presented. This Court has previously directed oral arguments to be heard.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT	i
STATEMENT OF POINTS AND AUTHORITIES	ii-v
COUNTERSTATEMENT OF THE CASE	1-2
<u>Bob Hook Chevrolet Isuzau, Inc. v. Commonwealth of Kentucky,</u> <u>Transportation Cabinet</u> , 983 S.W.2d 488 (Ky. 1998)	2
KRS Chapter 337	1
Minimum Wage Ordinance	1
ARGUMENT	2
29 U.S.C. Section 206(a)(a)	2
I. GENERAL ASSEMBLY GRANTED LOUISVILLE METRO BROAD HOME RULE AUTHORITY THAT PERMITS THE INCREASE IN MINIMUM WAGE	3
KRS §§ 67C.101, 83.410, 83.420, 83.520	3
a. Louisville Metro Has Unique and Complete Home Rule Authority	3-5
<u>Fiscal Court of Jefferson County v. City of Louisville,</u> 559 S.W.2d 478, 480 (Ky. 1977)	5, 7, 19
KRS § 67C.101	3, 4, 6
KRS Chapter 83	3, 6
KRS § 83.410	3, 4
KRS § 83.520	4
KRS § 82.082	6
KRS § 75.070	6
KRS § 67.083(3)(m)	7
b. Appellants Ignore Statutory Language in a Misleading Attempt to Limit the Authority Expressly Granted by the General Assembly	5-7
<u>Troxell v. Trammel</u> , 730 S.W.2d 525, 528 (Ky. 1987)	5
<u>Withers v. University of Kentucky</u> , 939 S.W.2d 340, 345 (1997)	5
<u>Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage Inc.,</u> 286 S.W.3d 790, 807 (Ky. 2009)	6
<u>Kentucky Harlan Coal Co. v. Holmes</u> , 872 S.W.2d 446 (1994)	6

KRS § 82.082	5, 6
KRS § 67C.101	6
KRS Chapter 83	6
KRS § 67.083(3)(m)	7

II. METRO GOVERNMENT'S MINIMUM WAGE ORDINANCE IS NOT IN CONFLICT WITH THE STATE WAGE AND HOUR STATUTE..... 7-13

<u>Lexington Fayette Cnty. Food & Beverage Association v. Lexington Fayette Urban County Gov't.</u> , 131 S.W.3d 745, 749 (Ky. 2004)	8
<u>Commonwealth v. Do, Inc.</u> , 674 S.W.2d 519, 521 (1984)	8
<u>Arnold v. Com. at Instance of City of Somerset</u> , 218 S.W.3d 661, 662 (Ky. 1949)	9, 10
<u>City of Harlan v. Scott</u> , 162 S.W.2d 8 (Ky. 1942)	9
<u>Boyle v. Campbell</u> , 450 S.W.2d 265 (1970)	11
<u>Sheffield v. City of Fort Thomas</u> , 620 F.3d 596 (6 th Cir. 2010)	11
<u>Jones v. City of Paducah</u> , 164 S.W. 102 (Ky. 1914)	12
<u>Kentucky Licensed Beverage Association v. Louisville-Jefferson County Metro Government, et al</u> , 127 S.W.3d 647 (2004)	12
<u>March v. Commonwealth</u> , 51 Ky. 25, 31 (1851)	13
KRS § 337.275	7, 8, 9, 11
KRS Chapter 337	7
KRS 67C.101(d)	7

III. THE GENERAL ASSEMBLY DID NOT EXPRESSLY PREEMPT THE LOCAL MINIMUM WAGE ORDINANCE BY CLEAR AN UNMISTAKABLE LANGUAGE AS REQUIRED BY CASE LAW 13-17

<u>Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government</u> , 131 S.W.3d 745, 752 (Ky. 2004)	13
<u>Dannheiser v. City of Henderson</u> , 4 S.W.3d 542 (1999)	14
<u>Whitehead v. Estate of Bravard</u> , 719 S.W.2d 720 (Ky. 1986)	14
<u>Historic Licking Riverside Civic Association v. City of Covington</u> , 774 S.W.2d 436 (Ky. 1989)	14
<u>Travelers Indem. Co. v. Reker</u> , 100 S.W.3d 756, 766 (Ky. 2003)	15, 17
<u>Swift v. Southeastern Greyhound Lines</u> , 171 S.W.2d 49, 51 (1943)	15

<u>Lexington-Fayette Urban County Government v. Johnson</u> , 280 S.W.3d, 31, 36 (Ky. 2009)	16
<u>City of Vanceburg v. Plummer</u> , 122 S.W.2d 772, 776 (Ky. 1938)	16
<u>New Orleans Campaign For a Living Wage v. City of New Orleans</u> , 825 So.2d 1098, 1108 (2002)	16
KRS § 337.275	13, 14, 16
KRS § 337	13, 16
KRS § 65.870	14-15
KRS § 237.110	15
KRS § 65.135	15
KRS § 77.170(3)	15
KRS § 241.140	15
KRS § 304.33-010(g)	15
LSA-R.S. 23:642	16

IV. APPELLANT’S *IPSE DIXIT* ASSERTION DOES NOT PREEMPT LOUISVILLE METRO’S ORDINANCE

17-19

<u>Travelers Indem. Co. v. Reker</u> , 100 S.W.3d 756, 766 (Ky. 2003)	15, 17
<u>Kentucky Municipal League v. Commonwealth</u> , 530 S.W.2d 198, 201 (Ky. 1975)	17
<u>Parts Depot, Inc. v. Beiswenger</u> , 170 S.W.3d 354, 359-60 (Ky. 2005)	17
<u>Louisville Metro Department of Corrections v. King</u> , 258 S.W.3d 419, 421-22 (Ky. Ct. App. 2007)	18
<u>Fiscal Court of Jefferson County v. City of Louisville</u> , 559 S.W.2d 478, 480 (Ky. 1977)	5, 7, 19
KRS 337	17, 18, 19
Federal Equal Pay Act of 1963	18
Title VII of the Civil Rights Act of 1964	18
29 U.S.C. § 401-531 (1947)	18
29 U.S.C.A. § 164(b)	18
UNITED STATES WOMEN’S BUREAU, STATE LABOR LAWS OF SPECIAL INTEREST TO WOMEN, BULLETIN OF THE WOMEN’S BUREAU HANDBOOK ON WOMEN WORKERS (1975)	18

V. FEDERAL LAW SUPPORTS LOUISVILLE METRO’S AUTHORITY TO INCREASE THE MINIMUM WAGE

19-21

<u>Garcia v. San Antonio Metro. Transit Auth.</u> , 469 U.S. 528 (1984)	19
<u>Directv, Inc. v. Treesh</u> , 290 S.W.3d 638 (Ky. 2009)	20

<u>Havens Point Enterprises, Inc. v. United Ky. Bank Inc.,</u> 690 S.W.2d 393, 395 (Ky. 1985)	21
KRS 337.275	19, 21
29 U.S.C. Sec. 206(a)(1)	19
<u>State Employees and Sovereign Immunity</u>	19
<u>Alternatives and Strategies for Enforcing Federal Employment Laws,</u> 39 Harv. J. on Legis. 169, 173 (2002)	19
VI. THE KENTUCKY SAVINGS CLAUSE RESPECTS MUNICIPALITIES’ AUTHORITY TO INCREASE MINIMUM WAGE ABOVE THE FLOOR ESTABLISHED BY THE GENRAL ASSEMBLY	21-22
<u>Lexington Fayette County Food & Beverage Association v.</u> <u>Lexington-Fayette Urban County Government,</u> 131 S.W.3d 745, 752 (Ky. 2004)	22
KRS 337.395	21, 22
VII. STATE LAW GRANTS EMPLOYEES A PRIVATE CAUSE OF ACTION FOR WAGE AND HOUR COMPLAINTS, INCLUDING THE HIGHER MINIMUM WAGE RATE ENACTED BY LOUISVILLE METRO	22-24
<u>Parts Depot, Inc. v. Beiswenger,</u> 170 S.W.3d 354 (Ky. 2005)	22
<u>Lynch v. Com.,</u> 902 S.W.2d 813, 814 (Ky. 1995)	23
<u>Healthcare of Louisville v. Kiesel,</u> 715 S.W.2d 246, 248 (1986)	24
<u>Roberson v. Brightpoint Services, LLC,</u> Civil Action No. 3:07-cv-501-s	24
<u>U.S., ex rel. U.S. Attorneys ex rel. E., W. Districts of Kentucky Bar Ass’n,</u> 439 S.W.3d 136, 147 (Ky. 2014)	24-25
KRS 337.020	22
KRS 337.385	23, 24
KRS 337.010	23
CONCLUSION	25
APPENDIX	26

COUNTERSTATEMENT OF THE CASE

Appellee, Louisville/Jefferson County Metro Government (“Louisville Metro”), legislated an increase to the minimum wage for employees in Louisville which was above the federal minimum wage rate of \$7.25. Prior to the enactment, Louisville Metro Council conducted numerous committee meetings over the course of 2014 to carefully consider the economic, legal, and social impact of such an increase. At the end of December 2014, seventeen of the twenty-four council members voted in favor of the increase and passed Ordinance No. 216, Series 2014, (“Minimum Wage Ordinance”) (R. 52-56). The ordinance was signed into law by Louisville Mayor Greg Fischer on January 2, 2015 and became effective July 1, 2015.

The Minimum Wage Ordinance established three annual increases to the minimum wage over the course of several years. The first incremental increase was 50 cents and brought the minimum wage to \$7.75 an hour effective July 1, 2015. The next increase takes effect on July 1, 2016, and increases the minimum wage another 50 cents to \$8.25 an hour. The final increase is triggered on July 1, 2017, when the minimum wage will rise by 75 cents, to \$9.00 an hour. Thereafter, the minimum wage is tied to the consumer price index and is scheduled to increase no more than 3% per year. In addition to the increases, the Minimum Wage Ordinance also adopts the definitions and exceptions set forth in KRS Chapter 337 as well as incorporating the private cause of action that is already allowed under state law for all employees, not just employees who make minimum wage. (R. 52-56.)

The procedural history in the case at bar is not in dispute. In an Order dated June 29, 2015, Jefferson Circuit Court Judge Judith McDonald-Burkman upheld the legality of the Minimum Wage Ordinance and ruled it enforceable. (R. 174-77.) Appellants

unsuccessfully sought emergency relief from the Kentucky Court of Appeals under CR 76.33 and CR 65.08(7) to enjoin the ordinance before its effective date. The Court of Appeals denied injunctive relief to Appellants. (R. 180-92.) The Appellants filed a motion to transfer, which was granted by this Honorable Court on September 24, 2015.

The standard of review is also not in dispute. The issue before the court is a very narrow question of whether the Minimum Wage Ordinance is preempted by state enactment and, as such, it is purely a legal interpretation of Kentucky statutes and decisional law. Thus, the parties agree on the appropriate standard of review. "The construction and application of statutes is a matter of law and may be reviewed *de novo*." Bob Hook Chevrolet Isuzu, Inc., v. Commonwealth Of Kentucky, Transportation Cabinet, 983 S.W.2d 488 (Ky. 1998).

ARGUMENT

Appellants claim Louisville Metro does not have home rule authority to enact a minimum wage that the Louisville Metro Council determined is in the best interest of the public welfare and benefit. Appellants rest the entirety of their claim on a single Kentucky statute which adopts the federal minimum wage set forth in 29 U.S.C. § 206(a)(1). However, to bolster their thesis, Appellants obfuscate pertinent Kentucky authority on the extensive parameters of Louisville Metro's home rule authority and distort the narrow circumstances governing preemption of state law over local ordinances. Below, Louisville Metro demonstrates that Kentucky law grants broad home rule authority to legislate in the best interests of its citizens. Within that broad grant of authority, Louisville Metro Council can *increase* the minimum wage within its legislative discretion but may not dip below the floor wage delineated by the state's statute.

I. General Assembly Granted Louisville Metro Broad Home Rule Authority that Permits the Increase in Minimum Wage.

Appellants exploit the existence of several Kentucky statutes on home rule authority in an attempt to create unnecessary confusion over the applicable law governing whether Louisville Metro has the authority to increase the minimum wage. While Appellants passively acknowledge that Louisville Metro's home rule authority is derived from KRS §§ 67C.101, 83.410, 83.420, and 83.520, Appellants then completely ignore the broad authority granted by the General Assembly within these statutes. Instead, Appellants limit their analysis to inapplicable and mostly archaic case law because they are unable to refute the General Assembly's clear statutory expression. An analysis of the controlling statutory authority illustrates that Louisville Metro has the power to increase the minimum wage.

a. Louisville Metro Has Unique and Complete Home Rule Authority.

It cannot be questioned that the legislature has granted Louisville Metro broad and extensive self-governmental authority. A review of that authority begins with KRS § 67C.101 with a specific delegation to Louisville Metro of "all powers and privileges that cities of the first class and their counties are, or may hereafter be, authorized to exercise under the Constitution and the general laws of the Commonwealth of Kentucky, including but not limited to those powers granted to cities of the first class and their counties under their respective home rule powers." To evaluate those powers granted to "cities of the first class and their counties," we look to KRS Chapter 83, which is appropriately titled "Home Rule."

KRS § 83.410 grants Louisville Metro the "authority to govern themselves *to the full extent*" necessary and such authority shall be "*broadly construed*" by the courts.

KRS § 83.410, which is appropriately titled, “Legislative finding and expression of legislative intent”, states: “(1) This chapter is intended by the General Assembly of the Commonwealth of Kentucky to grant to citizens living within a city of the first class the *authority to govern themselves to the full extent required by local government and not in conflict* with the Constitution or laws of this state or by the United States.” (Emphasis added.) The General Assembly further provided that the powers granted KRS § 83.410 are “in addition to all other powers granted to cities by other provisions of law.” Id.

KRS § 83.410 is a unique expansion of home rule authority specifically enacted for the benefit of first class cities and Louisville Metro via KRS § 67C.101. The General Assembly expressed its rationale behind the enactment, stating:

The powers herein granted are based upon a legislative finding that the urban crisis cannot be solved by actions of the General Assembly alone, and that the most effective agency for the solution of these problems is the government of a city of the first class. This legislative finding is based upon hearings held by the General Assembly and the conclusion of its members that conditions found in cities of the first class are sufficiently different from those found in other cities to necessitate *this grant of authority and complete home rule*. (Emphasis added.) KRS § 83.410(4).

In sum, the General Assembly’s manifest intention expressed in KRS § 83.410 is to grant Louisville Metro the “authority to govern themselves *to the full extent*” necessary and such authority shall be “*broadly construed*” by the courts. KRS § 83.520 similarly grants Louisville Metro the unique authority to govern itself. Specifically, KRS § 83.520 states:

The legislative body of a city of the first class shall have the power to exercise all of the rights, privileges, powers, franchises, including the power to levy all taxes, not in conflict with the Constitution and so as to provide for the health, education, safety and welfare of the inhabitants of the city, *to the same extent and with the same force and effect as if the General Assembly had granted and delegated to the legislative body of the city all of the authority and powers that are within its powers to grant to a municipal corporation as if expressly enumerated herein*. . . . the powers, rights and duties therein delineated may be modified or delegated by the legislative body to different departments and agencies of

city government and any restrictions therein set forth shall not be considered abridging in any manner the complete grant of home rule set forth in this grant of power except no right heretofore vested by operation of statute shall in any way be affected. (Emphasis added.)

As noted by the Supreme Court in Fiscal Court of Jefferson County v. City of Louisville, 559 S.W.2d 478, 480 (Ky. 1977), a case that decided the parameters of city and county home rule: “[m]unicipalities have been delegated vast authority to exercise the *police power*, i.e., to enact legislation relating to public health, safety, welfare and morals, and consequently, the range of municipal functions greatly exceeds that of county functions.” (Emphasis added.) The authority of Louisville Metro’s police power includes the power to increase the minimum wage.

Louisville Metro recognizes that there are some limitations on its home rule authority but certainly not to the extent argued by Appellants. Just because the state regulates an area does not mean that Louisville Metro is preempted from enacting additional regulations. Louisville Metro’s home rule authority is only limited to the extent it *conflicts* with state law, as discussed more below, and not in the haphazard manner described by the Appellants.

b. Appellants Ignore Statutory Language in a Misleading Attempt to Limit the Authority Expressly Granted by the General Assembly.

The more generic Kentucky home rule for cities is set forth in KRS § 82.082, which is neither a more recent nor a more specific statute concerning the source of Louisville Metro’s authority. Kentucky rules on statutory construction command, “a special statute preempts a general statute, that a later statute is given effect over an earlier statute. . . .” Troxell v. Trammell, 730 S.W.2d 525, 528 (Ky. 1987); see also Withers v. University of Kentucky, 939 S.W.2d 340, 345 (1997)(an elementary rule of statutory construction is that a specific statute rules over a general one regardless of when either

was enacted). KRS § 67C.101 went into effect in 2002, after the merger of Jefferson County and the City of Louisville, which means KRS § 67C.101 is *more recent in time* than the 1980 passage of KRS § 82.082 and also *more specific in nature*. As discussed above, KRS Chapter 83 exclusively concerns the home rule power granted by the General Assembly to Louisville Metro, while KRS § 82.082 is the generic home rule statute for cities in the Commonwealth.

Unable to refute the clear legislative expression contained in KRS Chapter 83, Appellants erroneously argue for a narrow interpretation of Louisville Metro's home rule authority.¹ Appellants first mislead the Court by removing the essential context from a quote in the case of Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc. to claim the General Assembly has exclusive domain in shaping public policy. 286 S.W.3d 790, 807 (Ky. 2009). A review of the entire quote shows the Caneyville Court considered whether a judicial rule versus legislative rule was the controlling authority in the case.² Here, the question before this Court is not between the separate branches of government, but concerns the extent of legislative authority granted by the General Assembly to Louisville Metro. Thus, the Caneyville court does not call for a narrow interpretation of Louisville Metro's home rule authority at all.

Likewise, there is no legal authority or public policy foundation for Appellants' claim that Louisville Metro's home rule authority should be limited in the area of employee-employer relationship. See Appellants' reference to Kentucky Harlan Coal Co.

¹ Appellants' Br. at p. 18.

² Caneyville specifically stated: "While policy determinations are generally beyond the purview of the judiciary, they are squarely within the legislative province. Thus, in response to the concerns of the courts and the public, the General Assembly enacted KRS 75.070. Shaping public policy is the exclusive domain of the General Assembly. *We have held that "[t]he establishment of public policy is granted to the legislature alone.* It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest." Id. (Emphasis added; citation omitted.)

v. Holmes, 872 S.W.2d 446 (1994), on page 18 of their brief. Louisville Metro agrees that legislative bodies have police power in the area of employer-employee relationship.³ However, this power is not restricted to the state, as Appellants would lead the Court to believe. As stated above in Fiscal Court of Jefferson County, supra, “[i]n municipalities have been delegated vast authority to exercise the *police power*. . .”⁴ which includes Louisville Metro’s power to increase the minimum wage.

In addition to the broad home rule authority cited above, KRS § 67.083(3)(m) permits counties to regulate “commerce for the protection and convenience of the public.” Since Louisville Metro has the greater authority and lesser restrictions of the two governmental entities⁵ and the term “commerce” clearly encompasses the business necessity of paying employees a lawful wage, this provision is further authorization for Louisville Metro to have the specific authority to raise the minimum wage in the absence of preemptive language in the minimum wage statute.

II. Metro Government’s Minimum Wage Ordinance is not in Conflict with the State Wage and Hour Statute.

Kentucky’s minimum wage statute, KRS § 337.275, is a stand-alone statute that is not dependent on any other statute nor does it reference another sections of the Wage and Hour Act, KRS Chapter 337.⁶ Instead, KRS § 337.275 adopts the federal law on

³ The Harlan Coal case concerned a constitutional challenge of a state law that provided paid benefits to coal miners sick as a result of exposure to coal dust. The Supreme Court upheld the law on for reasons unrelated to this case. Id. Here, the question concerns the power between two legislative bodies and not between the legislative body and the Kentucky constitution.

⁴ 559 S.W.2d at 480.

⁵ KRS § 67C.101(d) provides Louisville Metro became “a separate classification of government which possess the greater powers conferred upon, and is subject to the lesser restrictions applicable to, county government and cities of the first class under the Constitution and general laws of the Commonwealth of Kentucky.”

⁶ KRS § 337.275 states, “every employer shall pay to each of his employees wages at a rate of not less than five dollars and eighty-five cents (\$5.85) an hour beginning on June 26, 2007, not less than six dollars and fifty-five cents (\$6.55) an hour beginning July 1, 2008, and not less than seven dollars and twenty-five cents (\$7.25) an hour beginning July 1, 2009. If the federal minimum hourly wage as prescribed by 29

minimum wage. If KRS § 337.275 ceased to exist, minimum wage employees in Kentucky would continue to be paid the minimum wage permitted under federal law. This prohibits the state minimum wage from ever dipping below the federal minimum wage. Essentially, the General Assembly created a floor for wages and not a ceiling immune from local government increase.

The mere fact that the Kentucky has a Wage and Hour law does not mean that the subject matter is completely preempted from further regulation by Louisville Metro. Louisville Metro simply increased the minimum wage rate for Louisville Metro employees. "The mere presence of the state in a particular area of the law or regulation will not automatically eliminate local authority to enact appropriate regulations." Lexington Fayette Cnty. Food & Beverage Association v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 749 (Ky. 2004). Kentucky law states:

The true test of the concurrent authority of the state and local government to regulate a particular area is the absence of conflict. *The simple fact that the state has made certain regulations does not prohibit local government from establishing additional requirements so long as there is no conflict between them.* Id. (emphasis added); see also Commonwealth v. Do, Inc., 674 S.W.2d 519, 521 (1984).

In this latter case, the Kentucky Supreme Court explained that the "doctrine of preemption is often confused with the doctrine that provides that there should be no conflict between state and local regulation. Municipal regulation is not always precluded simply because the legislature has taken some action in regard to the same subject. *The true test of concurrent authority is the absence of conflict.*" Id. at 522 (citations omitted).

U.S.C. sec. 206(a)(1) is increased in excess of the minimum hourly wage in effect under this subsection, the minimum hourly wage under this subsection shall be increased to the same amount, effective on the same date as the federal minimum hourly wage rate."

Nevertheless, Appellants offer several inapplicable examples of local ordinances deemed preemptive. These cases involve a direct conflict between state and local law where the state legislation either specifically prohibited or specifically permitted activity that the local jurisdiction then regulated in a way that was contrary to the state law. A review of Appellants' cases illustrates they are in no way analogous to the matter at hand.

One of Appellants boldest contentions relies on two distinguishable cases from the 1940s: Arnold v. Com. at Instance of City of Somerset, 218 S.W.2d 661, 662 (Ky. 1949) and City of Harlan v. Scott, 162 S.W.2d 8 (Ky. 1942). Appellants argue that “[w]ithout dispute, the Legislature ‘has expressly licensed, authorized, and permitted’ employers throughout the Commonwealth to pay any wage ranging from \$7.25 – \$8.99 an hour.”⁷ However, KRS § 337.275 does not authorize, permit, or license anything. Instead, state statute *prohibits* employers from paying *below* the federally mandated minimum wage. Like the federal minimum wage, KRS § 337.275 acts as a minimum wage floor not minimum wage ceiling. There is no maximum minimum wage. Kentucky’s minimum wage statute is a prohibitive statute; one that forbids employers from paying *below* \$7.25 or whatever amount is enacted by federal statute. It is not, as Appellants want this Court to believe, an exclusive statute that specifically “authorizes” or “licenses” employers with a right to ignore a locally legislated higher minimum wage. Indeed, the minimum wage statute is not for the benefit of employers but insures the right of each and every employee in the Commonwealth to be paid at least the minimum rate required by state and federal law. Thus, the statute is purely to protect the wage rights of employees and prohibit employers from violating the minimum wage floor.

⁷ See Appellants’ Br. at p. 17; citing Arnold v. Com. at Instance of City of Somerset, 218 S.W.2d 661 (Ky. 1949).

Appellant's citation of Arnold v. Com. at Instance of City of Somerset, 218 S.W.2d 661, 662 (Ky. 1949) is improper. That case evaluated a city ordinance that *prohibited* the sale of alcohol containing more than one percent of alcohol even though the state specifically *permitted* the sale of alcohol with above one percent alcohol. Id. at 662. The court explained, "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required." Id. Similarly, Appellant's misapprehend the import of City of Harlan v. Scott. That case concerned a municipal ordinance that *prohibited* picture shows on Sunday after six p.m., despite the existence of a state statute that specifically *permitted* the operation of picture shows on Sunday. 162 S.W.2d 8 (Ky. 1942). The court found that the City of Harlan had "no power to *prohibit* the operation of a picture show on Sunday" because "[a]n ordinance may cover an authorized field of local laws not occupied by general laws but cannot *forbid* what a statute expressly *permits* and may not run counter to the public policy of the state as declared by the Legislature." Id. at 9 (emphasis added).

The case before the Court is the exact opposite of these two cases. Here, state law contains a prohibition against a lower wage and is wholly silent regarding a more generous minimum wage. Louisville Metro simply increased the minimum rate set by the General Assembly based upon the legislative considerations applicable to this City. The higher minimum wage in Louisville Metro is not forbidden by the General Assembly nor does it run counter to state policy. Thus, Appellants' analysis is entirely backwards. The Arnold conflicts rule would prohibit Louisville Metro from enacting a minimum wage *below* the state minimum wage rate of \$7.25 not *above* the state minimum wage rate. Appellants' argument attempts to create a conflict that simply does not exist.

The same reasoning is true in the case of Boyle v. Campbell, 450 S.W.2d 265 (1970). The General Assembly had passed a “Sunday Closing Law” that prohibited the operation of all businesses on Sunday. Despite this clear state law, the City of Bowling Green enacted an ordinance that exempted certain “work of necessity” sales from the state-wide ban on Sunday retail, including “grocery, drug and confectionary items.” Id. at 268. The court ruled the ordinance was preempted by state law and thereby invalid. Again, the Minimum Wage Ordinance does not seek to permit any conduct the state has prohibited. Louisville Metro did not alter any provision of the minimum wage statute as it does not require a wage rate lower than the floor established by KRS § 337.275.

Appellants also misinterpret the holding in case of Sheffield v. City of Fort Thomas regarding a deer feeding ordinance. 620 F.3d 596 (6th Cir. 2010). The Sixth Circuit ruled state regulation preempted the city ordinance, in part, because it was in *conflict* with state law. The Sheffield Court issued a narrow holding that struck down part of the ordinance and upheld the remaining portions of the ordinance:

[W]e hold that 301 Ky. Admin. Regs. 2:015 has preemptive force and that the Deer-Feeding Ordinance is preempted insofar as it purports to ban deer-feeding within the curtilage of Fort Thomas homes. However, we do not find the Deer-Feeding Ordinance preempted in its entirety, as it is a legitimate exercise of municipal authority as applied to deer-feeding *outside* the curtilage of the home. *No state statute or regulation is in direct conflict with such a scaled-back prohibition. Nor can it be argued that a ban on deer-feeding outside the curtilage of the home is implicitly preempted by Kentucky’s “comprehensive scheme” of wildlife legislation*, because Ky. Admin. Regs. 2:015 § 2(1) explicitly recognizes municipalities’ authority to prescribe local wildlife-feeding rules not inconsistent with that regulation. Id. at 612 (emphasis added).

Here, Appellants cannot argue that Louisville Metro's increase in the minimum wage is "implicitly preempted" by the lower state rate because the higher local rate is certainly not prohibited by the floor wage rate in state law.

Appellants likewise misconstrue the court's holding in the case of Jones v. City of Paducah, 164 S.W. 102 (Ky. 1914). Appellants want this Court to believe that Kentucky law prohibits fines established by ordinance. Instead, the court in Jones voided an ordinance that directly *conflicted* with state statute. The court in Jones held: "The city of Paducah had the right to impose, upon the trade or business these petitioners were engaged in, a license fee, but this power does not carry with it the authority to exact a license fee for the doing of a thing *forbidden* by the general laws of the state." Id. at 102 (emphasis added). Again, the General Assembly did not create a maximum minimum wage upon which municipalities are forbidden to regulate. Rather, Louisville Metro simply increased a minimum wage rate established by the state, which does not conflict with state law.

The holding in the case of Kentucky Licensed Beverage Association v. Louisville-Jefferson County Metro Government, et al., is more narrow than the Appellants would lead this Court to believe. 127 S.W.3d 647 (2004). The case involved a Louisville Metro ordinance that prohibited the sale of alcoholic beverages to minors as well as other regulations. Id. at 649. At issue in the case was the regulation against non-licensees. The Court held that Louisville Metro lacked authority to enact an ordinance allowing the local ABC to fine the employees of a licensee because "legislature did not intend for non-licensees to be regulated by the ABC Board." Id. at 651. The court in Kentucky Licensed Beverage Association did, however, uphold the local ordinance as it related to licensees. Id. In contrast, Louisville Metro is not prohibited by the state from

increasing the minimum amount that employers are required to pay their employees because the state created a floor not a ceiling for the minimum wage.

Appellants' reference to the ancient case of March v. Commonwealth, 51 Ky. 25, 31 (1851) is also irrelevant. The March court held, "if the city ordinance provides a penalty for the commission of an assault and battery within the city, it does not repeal or supersede the law previously in force upon the same subject. Either law may be enforced, but a conviction under one, is a bar to a proceeding under the other." Obviously, a case enunciating double jeopardy protections has no application to the question before the Court.

The cases above do not address the preemption question before this Honorable Court. Here, the Minimum Wage Ordinance does not conflict with state law, but rather exists concurrently with the state Wage and Hour laws.

III. The General Assembly did not Expressly Preempt the Local Minimum Wage Ordinance by Clear and Unmistakable Language as Required by Case Law.

The Kentucky Supreme Court has clearly held that preemption exists only if the General Assembly has specifically prohibited municipalities from entering a specifically regulated field which is not the case here. "When the legislature seeks to expressly preempt entire fields of local regulation and ordinance, it does so by clear and unmistakable language." Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government, 131 S.W.3d 745, 752 (Ky. 2004). Quite simply, neither KRS § 337.275 nor KRS Chapter 337 contains any express prohibitions against local government regulations in the area of minimum wage. As concluded by the Court of Appeals in this case:

[N]othing in the language of KRS 337.275(1) leads this Court to believe that the General Assembly intended to occupy the field to set a comprehensive scheme for a minimum wage or to set a mandatory maximum amount for a minimum wage if local governments, *answering to the voters in their respective communities*, determined that a higher minimum wage is necessary based on the unique needs of the citizens in their communities. (R. 188-189.)

The Court of Appeals in the case at bar relied on another relevant Kentucky Supreme Court case, Dannheiser v. City of Henderson, 4 S.W.3d 542 (1999), in reaching this conclusion.

The Dannheliser Court determined: “In order to rise to the level of a comprehensive system or scheme, the General Assembly must establish a definite system that explicitly directs the actions of a city.” (citing Whitehead v. Estate of Bravard, 719 S.W.2d 720 (Ky. 1986)) The Court of Appeals also cited Historic Licking Riverside Civic Association v. City of Covington, 774 S.W.2d 436 (Ky. 1989) for the holding that “no longer does a city need special statutory authority to act unless, of course, to do so is in conflict with a statute mandating otherwise, so long as the action is consistent with a public purpose.” (R. 189.)

The General Assembly has included explicit language in other statutes that specifically identify a comprehensive scheme and preempt local jurisdictions by saying the state has occupied the entire field. An example of express preemptive language exists in Chapter 65, relating to firearms:

No existing or future city, county, urban-county government, charter county, consolidated local government, unified local government, special district, local or regional public or quasi-public agency, board, commission, department, public corporation, or any person acting under the authority of any of these organizations ***may occupy any part of the field of regulation*** of the manufacture, sale, purchase, taxation, transfer, ownership, possession, carrying, storage, or transportation of firearms,

ammunition, components of firearms, components of ammunition, firearms accessories, or combination thereof.
KRS § 65.870 (Emphasis added.)

Other examples of the General Assembly expressly preempting local governments include: concealed carry under KRS § 237.110⁸, penalties for violent offenders and sex crimes in KRS § 65.135⁹, vehicle admission testing under KRS § 77.170(3)¹⁰, and alcohol and beverage control in KRS § 241.140¹¹, and the supervision, rehabilitation, and liquidation of insurance companies in KRS § 304.33-010(g)¹².

Where statutory language is clear and unambiguous, legislative intent is irrelevant. As the Kentucky Supreme Court stated in Travelers Indem. Co. v. Reker, “the courts should not resort to legislative history for the purpose of construing a statute where there could be no question as to the intent of the legislature[.]” 100 S.W.3d 756, 766 (Ky. 2003) (citing Swift v. Southeastern Greyhound Lines, 171 S.W.2d 49, 51 (1943)). Only where the “literal meaning of a statute makes it a substantial departure from the long-

⁸ KRS § 237.110(19) states: “The General Assembly finds as a matter of public policy that it is necessary to provide statewide uniform standards for issuing licenses to carry concealed firearms and to occupy the field of regulation of the bearing of concealed firearms. . . .”

⁹ KRS § 65.135 states: “(1) It is the intent of the General Assembly to occupy the entire field of legislation relating to: (a) Any person who has committed or is charged with the commission of a violent offense as specified in KRS § 439.3401; and (b) Any person who has committed or is charged with commission of a sex crime as specified in KRS § 17.500. . . .”

¹⁰ KRS § 77.170(3) states: “Local ordinances prohibiting, regulating, or controlling emissions from mobile sources of air pollutants shall prohibit emissions of, regulate, or control only mobile sources of air pollutants regulated under the state program established in accordance with KRS 224.20-710 to 224.20-765.”

¹¹ KRS § 241.140, titled Functions of county administrator – Jurisdiction, states: “The functions of each county administrator shall be the same, with respect to local licenses and regulations, as the functions of the board with respect to state licenses and regulations, except that no regulation adopted by a county administrator may be less stringent than statutes relative to alcoholic beverage control or than the regulations of the board. If any city appoints its own administrator under KRS 241.170, the county administrator in that county shall have jurisdiction over only that portion of the county which lies outside the corporate limits of that city, unless the department determines that the city does not have an adequate police force of its own or under KRS 70.540, 70.150, 70.160, and 70.170.”

¹² KRS § 304.33-010(g) states: “Provision for a comprehensive scheme for the supervision, rehabilitation, and liquidation of insurance companies and those subject to this subtitle as part of the regulation of the business of insurance, insurance industry, and insurers in this state. Proceedings in cases of insurer insolvency and delinquency shall be deemed an integral aspect of the business of insurance and are of vital public interest and concern.”

established legislative policy on the subject, known to the court, the doubt thereby arising as to the legislative intent requires an examination of available information bearing on the purpose desired to be accomplished by the legislation in question.” Id.; see also, Lexington-Fayette Urban County Government v. Johnson, 280 S.W.3d 31, 36 (Ky. 2009)(citing City of Vanceburg v. Plummer, 122 S.W.2d 772, 776 (Ky.1938)(“where a statute or ordinance is unclear or ambiguous ‘resort may be had to the journals or to the legislative records showing the legislative history of the act in question in order to ascertain the intention of the Legislature, but this rule does *not* apply where the language of the statute is plain and unambiguous.”)).

The amicus brief filed by the Kentucky Grocers Association/Kentucky Association of Convenience Stores (“Kentucky Grocers”) claims the public policy analysis contained in a Louisiana Supreme Court case in striking down the New Orleans minimum wage ordinance is relevant here.¹³ However, the Kentucky Grocers *failed to mention* that the Louisiana legislative body enacted legislation that prohibited local jurisdictions from increasing the minimum wage. LSA-R.S. 23:642 states, in no uncertain terms, “no local governmental subdivision shall establish a mandatory . . . minimum wage rate which a private employer would be required to pay or grant employees.” As a result, the Louisiana Supreme Court properly ruled that New Orleans was preempted by state law.¹⁴ Unlike Louisiana legislative body, the Kentucky General Assembly did not include preemptive language anywhere in KRS § 337.275 or KRS Chapter 337. As a

¹³ Kentucky Grocers Association/Kentucky Association of Convenience Stores Br. at pp. 7-8.

¹⁴ New Orleans Campaign For a Living Wage v. City of New Orleans held: “Because we find La. R.S. 23:642, prohibiting local governmental subdivisions from establishing a minimum wage rate which a private employer would be required to pay employees, is a legitimate exercise of the state’s police power, we conclude the City’s minimum wage law, which sets a minimum wage rate private employers are required to pay their employees, abridges the police power of the state. Therefore, we find the minimum wage law invalid.” 825 So.2d 1098, 1108 (2002).

result, Louisville Metro is not preempted by state law from increasing the minimum wage.

IV. Appellants' *Ipsse Dixit* Assertion does not Preempt Louisville Metro's Ordinance.

To distract the Court from the General Assembly's lack of expressed legislative intent, Appellants ignore Kentucky case law and instead resort to speculating about the legislative intent and history of KRS Chapter 337.¹⁵ Appellants' fruitless *ipse dixit* assertion is not only inaccurate, but is also disallowed under the rule that legislative intent is irrelevant where there is no ambiguity in statutory language.¹⁶ "[T]he courts should not resort to legislative history for the purpose of construing a statute where there could be no question as to the intent of the legislature[.]" Travelers Indem. Co., supra. However, Appellants conjecture merits a brief response.

First, Appellants misinterpret the holding in the case of Kentucky Municipal League v. Commonwealth to create an intent that was never expressed by the General Assembly or concluded by the courts. The plaintiff in Kentucky Municipal court challenged the state-wide application of the wage and hour laws because the previous statute exempted municipalities. 530 S.W.2d 198, 201 (Ky. 1975). The quote included in Appellants' brief on page 10 did not speak to the question of a comprehensive scheme on minimum wage; rather it addressed the state-wide application of laws that previously had not applied to cities.

Second, Appellants place unwarranted significance on a comment made *in dicta* by the court in Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354, 359-60 (Ky. 2005) that referred to the Women and Minors Act as a comprehensive scheme. Whether the Women

¹⁵ See Appellants Br. at pp. 10-12, 17-18.

and Minors Act comprehensively regulated pay through local boards is irrelevant for two reasons. One, the Women and Minors Act itself became unconstitutional after the Federal Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.¹⁷ Two, neither KRS Chapter 337 nor the Parts Depot Court hinted that local governments were excluded from the field of minimum wage. Thus, the Court's *in dicta* comment is neither binding nor persuasive on whether the minimum wage statute amounts to a comprehensive scheme under Kentucky law. Likewise, Appellants' inaccurate conjecture should be disregarded as a misunderstanding of legislative history.

Third, Appellants present the Court with a Kentucky Attorney General's amicus brief that addresses the question of right-to-work legislation in Hardin County, Kentucky.¹⁸ The Kentucky Attorney General's comments concern the completely separate issue of mandatory union membership, which is dependent on unrelated federal and state law¹⁹, and bears no relationship to this case. Also, this Court is not "bound by opinions of the Attorney General." Louisville Metro Department of Corrections v. King, 258 S.W.3d 419, 421-22 (Ky. Ct. App. 2007). The Kentucky Attorney General's

¹⁷ After the Federal Equal Pay Act of 1963, and title VII of the Civil Rights Act of 1964, many states adjusted their pay practices toward women comply with the federal law. The Kentucky Civil Rights Act was signed into law January 27, 1966, which is the same year that the Kentucky Women and Minors Act was repealed. State laws that were once considered "protective" in nature to keep women from being overworked or placed in hazardous working conditions were later determined to be in "direct conflict with Federal laws against sex discrimination" by limiting women's ability to earn additional pay and promotions. Court decisions, state and federal rulings, and repeals and amendments of state laws took place between the mid-sixties and early seventies across the country, resolving this issue. UNITED STATES WOMEN'S BUREAU, STATE LABOR LAWS OF SPECIAL INTEREST TO WOMEN, BULLETIN OF THE WOMEN'S BUREAU: 1975 HANDBOOK ON WOMEN WORKERS (1975).

¹⁸ See Appellants' Br. at pp. 17-18.

¹⁹ See Taft-Hartley Act *generally*, 29 U.S.C. § 401-531 (1947). Specific to Appellants' argument is 29 U.S.C.A. § 164(b), which addresses state law on mandatory union membership. Section b specifically states, "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Clearly, preemption on a different set of state, federal and local laws has no application to this matter.

commentary in a 2015 amicus brief on a completely unrelated topic does not speak to the General Assembly's legislative intent in passage of the state minimum wage law.

Last, Appellants claim the failure of legislation introduced in 2015 is somehow germane in determining past legislative intent of the General Assembly.²⁰ However, the case of Fiscal Court, cited by Appellant, says that failed legislation *may* be relevant as part of the legislative history for the court to determine legislative intent.²¹ Here, the introduction of legislation in the 2015 General Assembly to amend the minimum wage law has no relevance to the legislative intent at the time the General Assembly enacted and/or amended KRS Chapter 337.

V. Federal Law Supports Louisville Metro's Authority to Increase the Minimum Wage.

The General Assembly tied the state minimum wage rate to the federal minimum wage law set forth in Fair Labor Standards Act ("FLSA").²² KRS § 337.275 states:

If the federal minimum hourly wage as prescribed by 29 U.S.C. sec. 206(a)(1) is increased in excess of the minimum hourly wage in effect under this subsection, the minimum hourly wage under this subsection shall be increased to the same amount, effective on the same date as the federal minimum hourly wage rate.

Appellants' argument completely ignores the federal government's recognition that a municipal government has the right to increase minimum wage.

²⁰ See Appellants' Br. at p. 11, footnote 9.

²¹ A review of the entire quote in Fiscal Court, 559 S.W.2d at 480, is helpful in understanding the court's position: "In the interpretation of statutes, the function of this or any court is to construe the language so as to give effect to the intent of the legislature. There is no invariable rule for the discovery of that intention. The actual words used are important but often insufficient. The report of legislative committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may be looked at to determine the intent of the legislature."

²² FLSA regulates not only a minimum wage for employees but also requires additional compensation for overtime work and prohibits retaliation when employees assert their rights. State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws, 39 Harv. J. on Legis. 169, 173 (2002); citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1984).

FLSA inarguably authorizes cities like Louisville Metro to increase the minimum wage above the rate set by the federal government. Chapter 29 of United States Code, subsection 218(a), titled “Relation to Other Laws”, states: “No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or *municipal ordinance* establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter.” (Emphasis added.) Essentially, FLSA established a national floor under which wage protections could not drop, and does not preclude a higher wage established by a state or local governments.

The Kentucky Supreme Court, in the case of Directv, Inc. v. Treesh, 290 S.W.3d 638 (Ky. 2009), illustrates the significance of federal law on enforcement of state law. The Kentucky Supreme Court in Directv, Inc. stated: “‘congressional purpose’ is paramount and a reviewing court must consider not only the language of the statute but also the statute’s legislative history, an important indicator of Congress’s intent.” Id. at 642 (citations omitted). The Kentucky Supreme Court concluded: “Whether we (or our General Assembly for that matter) would concur with this distinction is irrelevant because Congress’s stated purpose is both apparent and controlling.” Id. at 643. As discussed extensively in the amicus briefs filed by the National Employment Law Project and the Kentucky Equal Justice Center, other local municipalities have exercised their authority to increase the minimum wage at the local level.²³

²³ See Kentucky Equal Justice Center Br. at pp. 2-15; National Employment Law Project Br. at pp. 10-11 see also United States Department of Labor compiled a list of states with increase minimum wage, which is published at <http://www.dol.gov/wld/minwage/america.htm#Consolidated>. A number of United States cities have increased the minimum wage above state and federal rates, including: Albuquerque, San Diego, San Francisco, Santa Fe, San Jose, and Seattle. See ALBUQUERQUE, N.M. ORD. Art. 12 (2006), SAN DIEGO, CALIF. MUNICIPAL CODE, Art. 2, Div. 42 (2005), SAN FRANCISCO, CALIF., ADMIN. CODE, Chap. 12R.1-.13

Federal law undoubtedly created a federal floor for minimum wage as clearly expressed in Section 218(a) of Fair Labor Standards Act. Relevant to the question of preemption is that § 218(a) was in effect when the General Assembly adopted KRS 337.275. Knowing that federal law recognizes local authority to increase the minimum wage, the General Assembly had the opportunity to foreclose local enactment but chose not to preempt local jurisdictions from increasing the minimum wage. As the Appellants also argue, the General Assembly is presumed to know of the existence of previously enacted statutes when it enacts later statutes.²⁴ Havens Point Enterprises, Inc. v. United Ky. Bank Inc., 690 S.W.2d 393, 395 (Ky. 1985).

VI. The Kentucky Savings Clause Respects Municipalities' Authority to Increase Minimum Wage above the Floor Established by the General Assembly.

The General Assembly also included a "savings clause" when it enacted the Wage and Hour law in 1974. KRS 337.395 states:

Any standards relating to minimum wages, maximum hours, overtime compensation, or other working conditions, in effect under any other law of this state which are more favorable to employees than standards applicable hereunder shall not be deemed to be amended, rescinded or otherwise affected by KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405 but shall continue in full force and effect until they are specifically superseded *by standards more favorable to such employees* by operation of or in accordance with KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405 or regulations issued thereunder. (Emphasis added.)

Appellants attempt to discredit KRS § 337.395 by asking the Court to ignore the clear language in the state statute and distinguish between prepositions. Whether the General Assembly drafted the "savings clause" with the preposition "of" versus the

(Added by Proposition L, 11/4/2003), SANTA FE, N.M. ORD. #2002-13, §1 (2003), SAN JOSE, CALIF. MUNICIPAL CODE, Chap. 4.100 (2012), SEATTLE MUNICIPAL CODE, Chap. 14.19 (2014).
²⁴See Appellants' Br. at p. 8.

preposition “in” is not determinative of whether a more favorable minimum wage law adopted by Louisville Metro is in harmony with state law. Again, if the General Assembly intended to preempt municipalities from increasing the minimum wage, it would have done so by clearly expressed preemptive language. See Lexington Fayette County Food & Beverage Association, supra.

More important is the language contained in KRS § 337.395 that the General Assembly favored “standards more favorable to such employees[.]” Id. This language is clear and unambiguous and can have but one meaning, i.e., the General Assembly intended employees to have the most generous pay scale available regardless of its legislative source.

VII. State Law Grants Employees a Private Cause of Action for Wage and Hour Complaints, Including the Higher Minimum Wage Rate Enacted by Louisville Metro.

The parties agree that state law provides a private cause of action for employees to collect unpaid wages in circuit or district court, as upheld in the Kentucky Supreme Court case, Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). Louisville Metro’s Ordinance on Minimum Wage merely recognizes an enforcement mechanism that already exists in state law – not just for minimum wage employees, but for all employees asserting a claim of unpaid wages. Appellants fail to inform the Court that private claims available under the Kentucky Wage and Hour chapter are not limited to employees who are paid minimum wage. All Kentucky employees are entitled to bring a private claim if they have not received the full amount of their wages.

KRS § 337.020 specifically provides: “Every such employee shall have a right of action against any such employer for the *full amount of his wages* due on each regular pay day.” Noticeably absent from KRS 337.020 is the term “minimum wage”. Instead,

the General Assembly allows employees the ability to file a private cause of action against employers for the “full amount of [] wages” owed. State law does not discriminate against the type of wages an employee receives. Rather, the law affords employees in Kentucky the opportunity to file suit in circuit court regardless of the wage earned.

The General Assembly also allows damages for employees seeking legal action against employers for wages earned. KRS § 337.385 provides employees with a cause of action in court for alleged wage and hour violations:

Except as provided in subsection (3) of this section, *any employer who pays any employee less than wages and overtime compensation to which such employee is entitled* under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. (Emphasis added.)

Again, absent from KRS § 337.385 is the phrase “minimum wage.” Instead, state law provides aggrieved employees with the opportunity to pursue “wages” owed under the terms of their employment. The term “wages” is not limited to “minimum wage.” KRS § 337.010 defines wages, in part, as “any compensation due to an employee by reason of his or her employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy.” A fundamental maxim of statutory construction is that words in a statute must be given their ordinary meaning. Lynch v. Com., 902 S.W.2d 813, 814 (Ky. 1995).

Kentucky case law confirms the sweep of the remedies provided in KRS § 337.385. In the case of Healthcare of Louisville v. Kiesel, a former director of Healthcare of Louisville brought an action in circuit court under KRS § 337.385 for the employer's failure to properly compensate him under the wage terms of his employment. 715 S.W.2d 246, 248 (1986). The ruling in Kiesel illustrates that KRS § 337.385 does not distinguish between "minimum wage" under Kentucky law or any higher salary with agreed-upon benefits. The Kiesel Court's decision was explicit that "[i]t is just as unlawful to fail to pay or to withhold a part of the salary of an executive, administrative, supervisory or professional employee as it would be to do so in the case of any other type of employee." Id. at 248.

An unpublished federal district court case cited by Appellants is likewise wholly irrelevant on the minimum wage question before this Court. Roberson v. Brightpoint Services, LLC, civil action no. 3:07-cv-501-s (March 24, 2008). The dispute in Roberson concerned an employment discrimination claim on the basis of sexual orientation. The General Assembly did not include sexual orientation as a protected class under state law so the plaintiff alleged the defendant violated the local ordinance, which did recognize sexual orientation in the anti-discrimination laws. The court in Roberson ruled against the plaintiff because the local ordinance expanded the state law to include a category of persons not covered by KRS Chapter 344. Id. Unlike Roberson, the Minimum Wage Ordinance mirrors KRS § 337.385 with language and creates no additional claims.

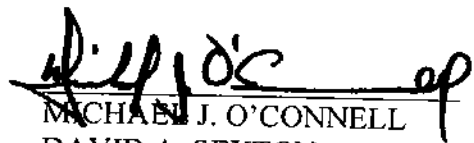
Additionally, the Roberson case is not controlling because the plaintiff in Roberson failed to appeal the district court's opinion so a reviewing court never considered this question on appeal. Moreover, the approach taken by a federal district court "may be viewed as persuasive but it is not binding" on state court. U.S., ex rel. U.S.

Attorneys ex rel. E. W. Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 147 (Ky. 2014).

CONCLUSION

In conclusion, Louisville Metro has adopted a Minimum Wage Ordinance for its citizens pursuant to its broad home rule authority under state law, its power under federal law, and without any express preemption to do so by the Kentucky General Assembly. Thus, Louisville Metro hereby requests the Kentucky Supreme Court sustain the Jefferson Circuit Court's Order dated June 29, 2015 upholding the Louisville Metro's Minimum Wage Ordinance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. J. O'Connell", is written over a horizontal line.

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APPENDIX

<u>ITEM</u>	<u>PAGE NO.</u>
<i>A. Order of Jefferson Circuit Court Dated June 29, 2016</i>	174-177
<i>B. Decision of Court of Appeals.</i>	180-192
<i>C. Minimum Wage Ordinance</i>	52-56